No. 89-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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SUMMARY OF ARGUMENT

The issue presented is so utterly straightforward that it is unfortunately susceptible to unnecessary complication as illustrated by the Government's arguments. The dispute giving rise to this litigation is one between a motor common carrier and a shipper contrasting the enforcement of an applicable, effective, and lawful tariff against an unfiled, negotiated rate specifically declared to be illegal by the plain language of the Interstate Commerce Act. This case has nothing to do with an unclear, ambiguous, or

silent statute, the discretionary powers of the Interstate Commerce Commission, or the ICC's primary jurisdiction. The statute clearly mandates collection of the legal and lawful tariff rate and neither the ICC nor a court has the power to subordinate a lawful tariff to a secret, illegal rate agreement of the parties.

The essential underpinning and overriding purpose of the Act is the elimination of "sweetheart" agreements. In no uncertain terms, the statute outlaws all departures from common carrier tariffs. So fundamental is this command that the Act comprehensively and exclusively addresses the remedies for failure to adhere to a duly filed, lawful tariff to ensure the integrity of a Congressionally mandated system in the public interest. These include civil and criminal penalties, a carrier duty to recover undercharges, and a shipper right to overcharges, both of which are computed from the lawful tariff rate. Congress created the ICC as its watchdog to police and enforce the statutory tariff filing and adherence requirements and granted to it the necessary powers to insist on compliance. Manifestly, Congress reserved for itself the remedies for non-observance of the tariff and left the Commission no discretion in the matter.

Against this backdrop, the Government urges that the statute implicitly authorizes a private remedy by which the ICC may relieve parties of their statutory violations and instead enforce the terms of their illegal conduct. Absent the clearest indication of the statute, it would indeed be anomalous to read the law as requiring the filing and collection of tariff rates, while simultaneously permitting the agency charged with enforcing the Act to subsequently wink at and negate these requirements.

The 1980 Motor Carrier Act indeed changed the face of trucking regulation, but it left intact common carrier tariff adherence requirements. Clearly delineated statutory provisions defined new pricing flexibility, not an unregulated free-for-all. Significantly, these new pricing freedoms are constrained by the tariff filing requirements thus reflecting their reaffirmance by the Congress.

The Commission's powers are limited. Though its primary jurisdiction enables it to determine the reasonableness of a rate or practice contained in a tariff, it has no authority to waive collection of a lawful tariff.

ARGUMENT

A. Imposition Of An Unfiled Rate Is The Antithesis Of Statutory Rate Regulation

At issue is a court's recognition of a secret rate agreement as a legal defense to an action to recover a published and filed tariff rate which the Commission examined but never found to be unlawful.[1] The Government concedes that courts may not recognize equitable defenses in such circumstances, but contends that this prohibition may be circumvented when ap-

[1] The reasonableness (lawfulness) of the tariff rates sought to be collected here is no longer controverted. Notwithstanding the submission of specific evidence on this question in the ICC proceeding, the ICC did not find the rates unreasonable in violation of the Act. Primary Steel did not seek review of the Commission's refusal to make this requested finding, 28 U.S.C. § 1336(c). It is thus jurisdictionally barred from challenging the reasonableness of the legal rates applicable to its shipments. *Burlington Northern, Inc.* v. *Northwestern Steel & Wire Co.*, 794 F.2d 1241 (7th Cir. 1986).

proved by the ICC.[2] Its argument focuses on the ICC's primary jurisdiction over motor carrier practices which it bootstraps into an asserted private remedy to avoid payment of lawful tariff charges.

As the Court's holdings[3] make clear, the Government has jumped off at the wrong starting point. Primary jurisdiction cannot be employed to create a remedy which does not exist. Under the Interstate Commerce Act, there is no right to a rate other than the lawful tariff rate. *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Congress has provided but one remedy to a shipper aggrieved by a motor carrier's filed, applicable and effective tariff in post-shipment litigation, viz., to challenge the reasonableness of the tariff itself. 49 U.S.C. § 11705(b)(3). The Government claims that this reparations provision is sufficiently broad to also provide a remedy where the imposition of a lawful rate would be unreasonable.[4] (Gov't. Br., p. 38). The crux of the argument is that since the ICC can declare a tariff rate unlawful under the rule of ratemaking standards of the Act, 49 U.S.C. § 10701(e), it can likewise declare unreasonable the collection of a rate which is "produced by an unreasonable practice." (Gov't. Br., p.

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[2] Respondent Primary Steel, on the other hand, argues that courts may recognize equitable defenses (Br., p. 9).

[3] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959); and *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

[4] The term reparations connotes remuneration for damages incurred. Inasmuch as the tariff rate was never paid, no damage has been incurred in the quoted rate situation and reparations are not available in the ordinary or statutory sense.

24). The fatal flaw in this argument is that the quoted rate, not the tariff rate, is the product of the asserted unreasonable practice.[5] We therefore agree that the Act does not permit enforcement of an unfiled rate produced by illegal conduct.

The Government nevertheless contends that the language of Section 11705(b)(3) should be read so that the term "rates" implicitly embraces "practices."[6] This is indeed a curious argument since throughout the Act, and in particular Section 10701(a), the terms are consistently stated separately. Section 11705(b)(3), of course, makes no mention of damages for past motor carrier practices and plainly limits the remedy to unlawful rates. Lest there be any doubt, former Section 204a(5) of the Interstate Commerce Act, which was codified into present Section 11705(b)(3) *without substantive change*, provided:

> The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 216(e) of this part, finds *them* to have been unjust and unreasonable,

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[5] No claim is made by the Government or Primary Steel that the tariff rates sought to be collected were in any way established unlawfully. Compare *I.C.C.* v. *American Trucking Associations*, 467 U.S. 354 (1984) authorizing a very narrow remedy where published tariff rates might be unlawfully *formulated*. Even under that remedy, rejected rates would be supplanted by the filed tariff rates in effect prior to the rejected tariffs.

[6] Respondent Primary argues similarly that, following the Court's decision in *T.I.M.E.*, Congress restored to shippers "parallel remedies" in post-shipment litigation for unreasonable rates or practices. (Resp. Br., p. 28).

> or unjustly discriminatory or unduly preferential or unduly prejudicial. (Emphasis added).

Congress specifically rejected legislative proposals which would have given motor carrier shippers a reparations remedy for any violation of the Act and was well aware that the motor carrier remedy was substantively narrower than that available against railroads and water carriers. (See Brief for Petitioners, pp. 19-23).[7]

Notwithstanding its assertions as to the plain meaning of Section 11705(b)(3), the Government does an about-face and argues that the Act is silent, or at least ambiguous, in that it does not specifically address unfiled negotiated rates. (Gov't. Br., pp. 22-23). The Interstate Commerce Act could not be more explicit in prohibiting secret agreements such as involved here and specifying the remedies therefor. That the Act does not provide a private remedy to a shipper allowing him to retain the fruits of his illegal bargain reflects the simple truism that one was never intended. Congress has directed the ICC to enforce the statute's tariff requirements, not eliminate them.

The Government nevertheless claims that the ICC has "fundamental authority to determine that the imposition of a filed rate would involve an unreasonable practice." (Gov't. Br., pp. 19-20). Not surprisingly, no statutory authority is advanced for such a proposition. The Commission has no remedial powers to relieve shippers from paying lawfully established rates on past shipments. The ICC's authority to require motor carriers to observe reasonable rates and practices is prospective only. 49 U.S.C. § 10704(b)(1).[8] Of course, Section 10701(a) grants no remedial power to the Commission or the courts, but serves only as an administrative criterion. *T.I.M.E., Inc.* v. *United States*, *supra*, 359 U.S. at 469.

[7] Amazingly, *amici* National Industrial Transportation League, et al. argue that petitioners never raised below the argument that a shipper has no statutory remedy for alleged past practices. (Br., pp. 13-14). This has been the crux of the issue throughout and was argued to the ICC, the district court, and the court of appeals. (See, e.g., Record on Appeal to the Eighth Circuit at 267a-270a, 480a-483a, and Reply Brief for Appellant to the court of appeals, pp. 10-11).

The Government erroneously infers from the ICC's prescriptive authority over motor carrier practices an implicit superpower within Section 10701(a) over past practices. Petitioners do not dispute the ICC's authority to determine that a practice is unreasonable. But the Government has twisted this authority in its most unnatural sense. The Act declares unlawful and hence unreasonable, the practice of collecting and paying a rate other than the lawful rate. The Commission's so-called unreasonable practice findings consisted of a determination that Maislin and Primary negotiated a rate which Maislin failed to file in a tariff but charged in any event. At this point, the ICC and the statute diverge. Whereas the statute demands collection of the tariff charges, the ICC says to do so would be unreasonable. Plainly, if any tension exists, it is between the ICC and the statute, not within the statute itself. Reliance on the ICC's jurisdiction over

[8] Indeed, the ICC has no authority even where it determines that a motor carrier rate is unreasonable on a past shipment. The remedy lies exclusively in the courts. 49 U.S.C. § 11706(c)(2). See also *Negotiated Rates* (JA 22).

"practices" is simply a pleading ploy. A court is empowered to determine whether a violation of the statute has occurred without the ICC's assistance. If the failure to charge and collect the filed tariff rate is a practice within the primary jurisdiction of the ICC which must be referred, *Maxwell*[9] and its progeny were all incorrectly decided.

B. The Suggested Remedy Contravenes The Statute

Urging that the ICC-crafted remedy is consistent with the Act, the Government contends that since Section 10761(a) does not "trump" Section 10701(a) it "cannot be construed to require the collection of a rate produced by an unreasonable practice in violation of the Act." (Gov't. Br., p. 24). The rate produced by the unreasonable practice is, of course, the unfiled, negotiated rate. Moreover, Section 10761(a) does, in fact, "trump" Section 10701(a). To read into the latter section the authority asserted by the Government would destroy and render meaningless the remainder of the statute.

The Commission's authority over practices is intended to ensure compliance with the statute. Ironically, it was the ICC's failure to enforce the tariff requirements of the Act in the early 1980s which gives rise to the present undercharge litigation.[10] Its

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[9] *Louisville & N.R.R.Co.* v. *Maxwell*, 237 U.S. 94 (1915).

[10]The Government and *amici* suggest that the ICC was inundated with tariff filings and without sufficient resources to fulfill its statutory responsibilities. This claim has no relevance to the question before the Court. However, it should be noted that for fiscal year 1981, the amount appropriated by Congress to the ICC was the highest in the agency's history. See ICC 1988 Annual Report to Congress, p. 139, App. D. In truth, the

dereliction surely does not create a power to retroactively validate disregard of the statute.

The Government urges, without explanation, that enforcement of unfiled rates would not undermine the tariff filing requirements of the Act. (Gov't. Br., p. 24). Such a contention is nonsensical as it seems to be premised on a construction that the statute requires the filing of rates, but not their collection. The statutory requirements are unambiguous and the ICC's efforts to nullify them have been flatly rejected by the courts. See, e.g., *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) (holding unlawful ICC's authorization of a tariff permitting unfiled, negotiated rates to govern transportation).[11] Just as perplexing is the claim that a shipper who pays the lawful tariff rate rather than a lower unfiled rate negotiated with other shippers could bring a claim based on discrimination. (Gov't. Br., p. 27). However, in the absence of filed rates, such a shipper would not know the rate paid by others or even be aware that he had been the victim of discrimination. Similarly, competing carriers could not challenge quoted rates as being unreasonably low and shippers could not attack them as being unreasonably high.

Thwarted at every turn by the statute itself, the Government is forced to resort to asserted equity and

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ICC was on record as opposing continued motor carrier regulation and followed a chosen course of non-enforcement.

[11] In their zeal to defend the ICC's purported authority, *amicus* Shippers National Freight Claim Council, Inc. misrepresents in its entirety the holding in *Regular Common Carrier Conference* by asserting that the court upheld the ICC's rejection of the tariff. (See Brief, p. 17).

fairness. Congress, however, addressed these factors by requiring the filing and posting of tariffs, 49 U.S.C. § 10762, thereby affording shippers the right and duty to verify the rates charged by carriers. They are therefore conclusively presumed to have knowledge of the tariff. *Maxwell, supra*, and *Kansas City Southern Ry.* v. *Carl*, 227 U.S. 639, 653 (1913). Without this presumption a shipper could avoid the lawful rate by merely claiming, as here, that it was unaware of the tariff. Having the legal right to inspect a carrier's tariff, the negligent or less than diligent shipper cannot, as a matter of law or equity, claim that he reasonably relied on the carrier's representations.[12] This is a far cry from a shipper's honest but mistaken belief as to the proper interpretation of a tariff. (See Gov't. Br., p. 26). Finally, the Government's plea that carriers should not be permitted to "reap the rewards" in collecting amounts that the law requires rings hollow. Though a private shipper might be expected to advance such a claim, it is surprising to hear the Government advocate selective non-enforcement of a law which results in a shipper retaining the fruits of its illegal bargain. An individual shipper is not injured by a result which the law mandates. To the contrary, the injury has been absorbed by the thousands of shippers who paid the lawful tariff. The

[12] The generalized contention that it would be difficult for a shipper to obtain a tariff, in addition to being immaterial, is not true. The easiest method of doing so, and the method traditionally employed by responsible shippers, is to simply request a copy from the carrier. Primary Steel never even took that initial step. Beyond this, as pointed out in Petitioners' opening brief (p. 25), at the time in question tariff changes could only be implemented on 30 days' notice, more than ample time for the ICC or a tariff watching service to produce the tariff.

Act was and is designed to protect all members of the shipping public. Congress determined that the actual or potential evil posed by secret rate agreements is so repugnant to the statutory scheme as to warrant the sometime harsh results of the filed rate doctrine.

C. The MCA Of 1980 Gave The ICC Explicit Directions And Well Defined Parameters For Regulation Of The Motor Carrier Industry

Interspersed throughout the Government's brief is the argument that the Motor Carrier Act of 1980 (Pub.L. 96-296, 94 Stat. 793) "vastly changed [the] regulatory . . . environment in which the motor carrier industry operates" resulting "in today's more flexible pricing atmosphere." (Gov't. Br., pp. 6 and 9 citing *Negotiated Rates I*; see also Gov't. Br. pp. 3-5, 13-14, 25 and 28). The short answer to this contention is that, while significant statutory changes did occur as a result of the 1980 legislation, Section 10761(a) of the Act was not amended and, contrary to the Government's position, it continues to apply with equal force when determining the rights of shippers and carriers arising from motor common carrier transportation. Accepting this as an accurate statement, this Court's holding in *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984), is dispositive. However, putting *Chevron* aside for the moment, in view of the Government's contentions, it is appropriate to review the legislative history underlying enactment of the MCA of 1980 to dispel the notion that Congress relaxed the requirements of Section 10761(a).[13]

[13] We reject the contention that "[t]he filed rate doctrine . . . does not apply in this case." (Gov't. Br., p. 13). Respondent's

It is abundantly clear that Congress envisioned the MCA of 1980 to be a major revamping of the regulatory scheme under which the ICC would continue its regulation of the motor carrier industry. Numerous specific statutory changes were made that, to one degree or another, altered continued regulation of motor carriers and the competitive relationship existing between different classes of motor carriers such as common and contract carriers.[14] On the subject of "more flexible pricing", Congress took what it considered to be two major steps in relaxing the Commission's jurisdiction over motor common carrier pricing practices. The House Report accompanying Public Law 96-296 provides a clear understanding of precisely what was intended. Its reference to "allowing price flexibility" is explained to refer to Sections 11 and 12 of the enacted Bill authorizing motor carriers to establish rates within a so-called zone of rate freedom and to establish reduced rates in exchange for shippers' agreements to limit carrier liability.[15]

Addressing the zone of rate freedom authorization, Section 10708(d), the Committee Report indicates that this provision was added to the Act "to assure more flexible downward pricing ability for existing carriers or new carriers establishing new services after July 1, 1980, for which tariffs were not filed or published in tariff form." House Report No. 96-1069, reprinted in U.S. Code Cong. & Admin. News, p. 2306. Con-

"improvisation", i.e., primary jurisdiction coupled with unreasonable practice authority, cannot negate the requirements of the filed rate doctrine.

[14] See Brief for Petitioners, pp. 26-29.

[15] Sections 10708(d) and 10730(b), 49 U.S.C. § 10708(d) and 10730(b).

cerning Section 10730(b), the provision applicable to limited liability rates, it was viewed as a means to increase ". . . the range of [price] choices available to the shipping public." Id., 2307. A fair reading of the Committee Report indicates that these two additions to the Act were perceived to be the centerpiece of Congress' injection of greater pricing flexibility authority into the manner in which motor common carriers price their services. As for other ostensible changes resulting from the 1980 legislation, there were none that affected the obligations mandated by Section 10761(a) of the Act. As Congress said, ". . . the intent of this legislation is to overhaul outmoded and archaic regulatory mechanisms, while retaining the pluses of an industry that has worked by simply conducting itself under the 'rules of the game.' " U.S. Code Cong. & Admin. News, p. 2284. Thus, the "rules of the game" as they apply to the tariff adherence requirements of Section 10761(a) were reviewed by Congress in 1980, but they were not altered.[16]

The Government's brief also requires a response directed to the recast national transportation policy, 49 U.S.C. § 10101, in terms of Congress' vision of the Commission's role in continued regulation of the motor carrier industry. The relevant legislative history indicates that a degree of antagonism existed between the ICC and Congress emanating from what certain key Congressional leaders viewed as unauthorized ICC intrusions into areas reserved to the

[16] As we noted in our Opening Brief, p. 19, n.27, Congress addressed and left intact Section 10761 when it added subsection (c), excluding business entertainment expenses as defined in 49 U.S.C. § 10751, from computation of a carrier's cost of service rate base.

Congress. This situation is more than apparent when one reviews the following Congressional expressions concerning the MCA of 1980 and the Commission's role in its future administration:

> [I]n order to reduce the uncertainty felt by the Nation's transportation industry, the . . . Commission [is] given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; . . . the . . . Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act . . . and other legislation enacted by Congress. 94 Stat. 793.

Senator Cannon, one of the sponsors of the 1980 Act, explained:

> [L]egislation is desperately needed to clarify the existing regulatory uncertainty that plagues the industry and those who care about it . . . . This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated. 126 Cong. Rec. 7777 (1980).

Returning to the *Chevron* decision, *supra*, this Court is confronted with the two questions it announced govern a court's review of an agency's construction of the statute it administers, viz., ". . . whether Congress has directly spoken to the precise question at issue", and, if it has not, ". . . whether the agency's answer is based on a permissible construction of the

statute." Id., 482. The answer provided by the Court to the first question is dispositive in this case:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. [footnote omitted.]

No ambiguity or uncertainty exists in the action taken by Congress in 1980. Section 10761(a) of the Act and its requirements remain unchanged. The Government would have this Court accept the proposition that since Congress did not directly reiterate the tariff adherence requirements of the Act, Sections 10701(a) and 10704(b)(1) provide the Commission with sufficient latitude to nullify the requirements of Section 10761(a). Respondent's proposition is a form of improvisation this Court rejected in *Montana-Dakota*, *supra* and *T.I.M.E.*, *supra*. Moreover, it is also rejected by the plain language of the statute and it is without support in the legislative history of the MCA of 1980. *Square D Company* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986); *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (5th Cir. 1983).

D. The ICC Has Primary Jurisdiction Over Any Motor Carrier "Rate . . . Classification, Rule Or Practice" That Derives From A Lawful Tariff

The Government's primary jurisdiction argument contains an obvious flaw which runs directly contrary to the position it has assumed. The Government contends that a number of cases it relies on illustrate how its interpretation of the reach of Section 10701(a) of the Act ". . . accords with the underlying purposes and express provisions of the Act." (Gov't. Br., p.

32). A review of the cases relied on demonstrates that they were decided in complete accord with a natural construction of Section 10701(a), and not the strained construction offered in support of unfiled rates. What distinguishes each case from the instant case is the fact that they involved Commission interpretations of legal tariff provisions or determinations of legally applicable rates. They did not involve a choice between a legally applicable tariff rate and an unfiled secret rate.

Most notable among the cases relied on by the Government and the courts below throughout the course of this litigation is *Seaboard System R.R., Inc.* v. *United States*, 794 F.2d 635 (11th Cir. 1986). Before addressing the specific facts presented in that case, it is important to note that the Government, in its brief to the Court, has effectively abandoned it's reliance on *Seaboard*. The Government's references to it no longer reflect the credence formerly placed on that decision. (Gov't. Br., pp. 11-12, 30).

In the petitioners' opening brief it was explained that the court of appeals placed significant reliance on *Seaboard* as did the ICC. (Brief for Pet., pp. 16-18). The Commission's jurisdiction over rail and motor carrier undercharge cases was distinguished and, since *Seaboard* involved a rail carrier's action for undercharges, the Commission's authority in matters involving motor carrier tariff charges was shown to be entirely different. It is also obvious that *Seaboard* is the cornerstone of the ICC's decisions in *Negotiated Rates I* and *Negotiated Rates II*. In *Negotiated Rates I*, on the question of whether the Commission has authority in a motor carrier action for recovery of undercharges to ". . . consider all of the circumstances surrounding . . . [the] suit", the Commission held that: "The recent *Seaboard* decision confirms that Section 10701(a) (which applies to motor as well as rail carriers) and Section 10704 gives us the authority to make this determination." (JA 16).[17]

The facts presented in the Commission decision[18] under review in *Seaboard* indicate that the Commission was faced with a choice between two legally filed tariff rates (a single car rate versus a multiple car rate). The Commission held, *inter alia*, that the railroad's tariff ". . . lent itself to misinterpretation by the ordinary user." Thus, the Commission resolved the tariff's lack of clarity in favor of the shipper and required the application of the lower of the two filed rates to the shipper's traffic.

The other court and Commission decisions relied on by the Government reflect the same pattern. For example, in *Hewitt-Robins, supra*, 371 U.S. at 86,[19] the choice was between one of two legally filed rates, a rate applicable over an intrastate route, and a rate applicable over an interstate route. *Carriers Traffic Service, Inc.* v. *Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989),[20] involved a legally applicable filed tariff requirement calling for a "shipper load and

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[17] It should not go unnoticed that the Commission's reliance on Section 10704 of the Act was made with no attempt to distinguish between the difference in the authority extended to the Commission by the railroad provision (Section 10704(a)(1)) or the motor carrier provision (Section 10704(b)(1)).

[18] *Buckeye Cellulose Corp.* v. *Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985).

[19] Gov't. Br., pp. 34 and 36.

[20] Id., p. 38.

count" notation on the bill of lading. The same factual situation was presented in *Western Transportation Co.* v. *Wilson and Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982),[21] and *Standard Brands, Inc.* v. *Central R. Co. of N.J.*, 350 I.C.C. 555 (1974).[22] Rather than further belabor the point, we briefly refer the Court to four other decisions relied on by the Government as further support for its Section 10701(a) reasonable practice-primary jurisdiction argument.[23] *Piedmont Mills, Inc.* v. *Norfolk & W. Ry. Co.*, 296 I.C.C. 481 (1955), involved a single factor filed tariff rate versus a combination of filed tariff rates; "A tariff, however, should be construed where practicable, so as to give effect to all of its provisions rather than in a manner which would create a conflict." 296 I.C.C. 483; *Garson Iron & Steel Co., Inc.* v. *Atlantic & N. C. R. Co.*, 237 I.C.C. 724 (1940), involved an applicable tariff rate found to be unreasonable to the extent it exceeded a lower inapplicable tariff rate—the railroad was authorized to waive its collection of undercharges; *Sheboygan Fruit Co.* v. *Chicago & N. W. Ry. Co.*, 214 I.C.C. 157 (1936), involved a filed tariff class rate versus a filed tariff commodity rate; the defendant railroad introduced no evidence in the proceeding and the Commission awarded reparations. Finally, we would not term the practice at issue in *Adams* v. *Mills*, 286 U.S. 397 (1932), a "billing practice" as does the Government. Rather, the Court's decision turned on the fact that an unloading service was included in the carriers' filed tariff linehaul rates and, therefore, an additional charge for unloading

[21] Id.

[22] Id., p. 32.

[23] Id., p. 22, fn. 16 and p. 39, fn. 32.

could not be applied. Shipper complainants were awarded reparations.

The point made by the foregoing decisions is that shippers' claims against common carriers are measured by the filed tariff, *Square D, supra*, are resolved before the ICC and/or courts, and if they arise from an unlawful secret rate arrangement, the shipper is without a justiciable legal right. *Montana-Dakota, supra* and *T.I.M.E., supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

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